

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: SOSCIA ENTERPRISES, INC. AAD NO. 93-012/WRE
NOTICE OF VIOLATION NO. 1130

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matter ("AAD") pursuant to the Respondent's request for hearing on the Notice of Violation and Order ("NOV") issued by the Division of Water Resources on June 21, 1993 and by the Division of Groundwater and ISDS (both Divisions are hereinafter referred to singularly as "Division") on June 22, 1993. The hearing was conducted on April 10, 11 and 12, 1995. Post-hearing memoranda were filed by the Division and Respondent on May 19 and May 22, 1995, respectively. On August 17, 1995, pursuant to the Hearing Officer's request for clarification of Division's Exhibit 7, the parties filed the Stipulation which is attached hereto as Appendix A. (See footnote p. 10)

The hearing was conducted in accordance with the statutes governing the Administrative Adjudication Division (R.I.G.L. §42-17.7-1 et seq), the Administrative Procedures Act (R.I.G.L. §42-35-1 et seq), the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"), and the Rules and Regulations for Assessment of Administrative Penalties, May 1992 ("Penalty Regulations").

PREHEARING CONFERENCE

A prehearing conference was conducted on August 12, 1994 at which the parties agreed to eight (8) stipulations of fact. Those stipulations (as they were set forth in the Prehearing Conference Record and Order entered on August 18, 1994) are attached hereto as Appendix B. The exhibits offered by the parties, marked as they were admitted at the hearing, are indicated on Appendix C.

BACKGROUND

The Notice of Violation and Order, issued jointly by the Division of Water Resources and the Division of Groundwater and ISDS on June 21, 1993 and June 22, 1993, respectively, cites Respondent for violations of R.I.G.L. Chapter 46-12 entitled "Water Pollution", the Water Quality Regulations for Water Pollution Control ("Water Quality Regulations"), and the Rules and Regulations Establishing Minimum Standards Relating to Location, Design, Construction, and Maintenance of Individual Sewage Disposal Systems ("ISDS Regulations"). The NOV alleges in paragraph one (1) that on three occasions it was determined that sewage had been discharged from a pipe on the subject property and had entered an unnamed stream that discharges to the South Branch of the Pawtuxet River. Paragraph two (2) alleges that on three occasions it was determined that water containing sewage was being discharged into an unnamed stream from a pipe which had not been present

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in the earlier inspection conducted on July 30, 1992; that the Department had not granted approval for installation of the pipe; and that prior to July 30, 1992 the Respondent had been notified that the placement of any pollutant, including sewage, in a location where it is likely to enter the waters of the State is prohibited under Section 46-12-5 of the Rhode Island General Laws.

The substance of the violation set forth in paragraph one of the NOV was addressed by the parties at the hearing by way of the following stipulation:

On February 24 and April 12, 1993, a fecal coliform discharge occurred from Respondent's property into the South Branch of the Pawtuxet River. The parties have agreed to the assessment of an administrative penalty in the amount of Ten Thousand (\$10,000.00) Dollars for the two (2) offenses. The Division agreed to not seek a penalty for the discharge alleged to have occurred on January 19, 1993.

The stipulation regarding the substance of paragraph one (1) of the NOV having been agreed to and the system having been repaired to the satisfaction of the Division, the Division seeks a further administrative penalty in the amount of Twenty-Five Thousand (\$25,000.00) Dollars for the alleged violation set forth in paragraph two (2) of the NOV.

HEARING SUMMARY

The first matter considered at the hearing was agreement by the parties to the above stipulation, thereby limiting the

issue for hearing to that addressed in paragraph two (2) of the NOV. The Division presented three witnesses: Russell Brown, who was qualified as an expert in the investigation and conduct of tests for possible violations of the Water Resources Division's regulations and the ISDS regulations and, in the Division's rebuttal, was also qualified as an expert in the area of land surveying; Thomas Iarossi, who was qualified as an expert in conducting water investigations to determine compliance with water quality and water resources regulations, as well as with the ISDS Regulations; and David Chopy, who was qualified as an expert as a professional engineer and in the Division's procedures for the issuance of notices of violation, application of the Department's Water Quality and ISDS Regulations as well as in the evaluation of the severity of the violations of those regulations. Respondent called Russell Tourgee, Wayne Cullen, and Bryan Soscia to testify on the corporations's behalf.

Respondent's property which is the subject of the NOV, is located in the Town of Coventry adjacent to an unnamed stream that discharges to the South Branch of the Pawtuxet River. The stream curves, running along the northern and eastern boundaries of the property and flows in a north to south direction. Points of reference in the testimony, particularly regarding testing results obtained from the stream samples, include the railroad tracks which cross the stream north of

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the site; the location of the two-inch PVC pipe south of the railroad tracks; the two four-inch PVC pipes further south which run from the stream west, beneath the gravel parking area alongside the building occupied by Jerry's Market; and the headwall located adjacent to the site, but even further downstream. The two four-inch pipes run west to an open grate catch basin ("OGCB #5") located in the parking area; a single four-inch PVC pipe continues west from that catch basin to another open grate catch basin ("OGCB #6"). The failed leaching field, located immediately west of the gravel parking area, is at an elevation three to five feet higher than the parking area and slopes toward the stream bed.

There is little disagreement between the parties as to what the Department's employees observed on site; instead, the dispute in this matter centers on the conclusions drawn from those observations. What occurred during winter months and the effect, if any, of the accumulation of ice on the flow of water and sewage in the parking area and its impact on the Division's testing, forms the basis of Respondent's arguments against the claims of the Division.

The Division alleges that sometime between July 1992 and January 1993, because Respondent could no longer use the four-inch pipes which are discussed below and which received such close DEM scrutiny, he covertly installed a two-inch pipe which extended from the failed leach field to a point north of

where the four-inch pipes had discharged into the stream.

According to David Chopy, the Division determined that this violation, installing the new pipe without a permit when Respondent knew that the placement of any pollutant, including sewage, in a location where it was likely to enter the waters of the State was prohibited, was so egregious that it warranted the maximum administrative penalty allowed under the Penalty Regulations.

The Division's first witness, Russell Brown, testified that he conducted an inspection of the site on November 14, 1991 and detected algae growth in the area between the two four-inch pipes and the headwall downstream, indicating a nutrient feed into the area. Water samples were collected from various locations on the property and along the stream. The illustration on page two of Division's Exhibit 7 identifies the results of the sampling, with the water collected from OGCB #5 and two four-inch PVC pipes showing the highest and second highest levels of contamination. With the cooperation of the owner of the property, Mr. Brown conducted a dye test from OGCB #6 and observed the dye enter the stream through the two four-inch PVC pipes.

Division's Exhibit 7, a complaint report prepared by Russell Brown which contains entries from November 6, 1991 through May 27, 1994, indicates further testing occurred on November 26, 1991. Dye placed in the bathroom was later

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discovered in the concrete tank containing the pumps, located adjacent to the leaching field. at 4.

According to the report, in December 1991, water which had seeped through the bank containing the leach field had frozen in OGCB #6, though graywater was noted in the area of the pipes discharging into the stream. In his testimony, Mr. Brown added that the whole area in back of the store smelled of sewage and that sometimes the water which accumulated in the parking area would flow over the berm and into the stream. He did not observe any dye in the parking lot however.

Brown wrote in Division's Exhibit 7, that in January, 1992 a large amount of ice had formed in the gravel parking area, extending into OGCB #6, but again discolored water was discovered in the stream in the area of the four-inch pipes; and in February, 1992, the area was very wet and water covered OGCB #6, but there was no flow between OGCB #5 and OGCB #6. In the report, Mr. Brown speculated that a pipe may have frozen between #5 and #6. Despite the lack of flow between OGCB #5 and #6, Brown again noted that discolored water was being discharged into the stream.

On February 6, 1992 the Division of Water Resources advised Mr. Soscia by letter that, as a result of the November 14, 1991 inspection of the site, it was determined that a sewage discharge from the property was entering the waters of the state in violation of Section 46-12-5 of the Rhode Island

General Laws. Respondent was required to take corrective action, otherwise the matter would result in an enforcement action. Div. 10 Full.

Additional testing was done in the spring of 1992 when Brown placed dye into the concrete tank with the pumps (adjacent to the leaching field) and Thomas Iarossi deposited a charcoal pack into OGCB #6. Brown considered that since the water level was low in the pumping station, he must have just missed a pumpout. According to Brown's report, there was no seepage from the bank containing the leach field and the gravel parking area was dry. He detected a strong odor of sewage at OGCB #6 and a similar odor at the stream in the area of the discharge pipe, where he also noted that the water was discolored. Later in the same day, Mr. Iarossi returned to the site to check on the route of the dye, but the green florescent dye was not evident in the catch basin. On April 16, 1992, the day following the testing, the report states that OGCB #6 contained the dye and that the charcoal test indicated a positive discharge. Div. 7 Full, p. 4.

In June 1992, according to the report, Mr. Brown met Bryan Soscia, the Vice President of Soscia Enterprises, at the site. Soscia was informed that the Division had obtained a positive test from the tank to the catch basin; clearly, the Division believed that the sewage overflow was being intentionally channeled to the stream. Soscia proposed that

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the positive result was caused by the dye and sewage running over the surface of the ground into the catch basin. As Mr. Soscia had previously told Brown that the pipe in question was connected to the roof downspouts (see Div. 7 Full, p. 6, notation of 5/21/92), Mr. Brown advised Soscia that the Division wanted to see the pipe exposed to the roof drains and then removed. Div. 7 Full, p. 6 (also in testimony).

Mr. Iarossi testified that he arrived at the site on July 29, 1992 after Bryan Soscia, operating a backhoe (which Soscia later testified that he had rented for the occasion), had already uncovered the pipe. It was Mr. Iarossi's opinion that the pipe was too clean and unmarked to have been underground. Later, when Bryan Soscia testified, he explained that he had waited for Mr. Iarossi before proceeding to uncover the pipe.

The Division alleges that sometime between July 1992 and January 1993, because Respondent could no longer use the catch basins and the four-inch pipes as a relief system for the failed leaching field due to the DEM scrutiny, he covertly installed a two-inch pipe which extended from the failed leach field to a point north of where the four-inch pipes had discharged into the stream.

The two-inch pipe (sometimes also identified as 1 1/4

inch pipe) was discovered in January 1993.¹ Russell Brown had been to the site on or about January 13, 1993 to collect additional water samples and noted a discharge in the area of the four-inch PVC pipes as well as a strong odor of sewage near the stream. He also observed algae growth north of the four-inch pipes.

Nearly a week later, he returned to conduct a dye test and discovered the two-inch pipe approximately fifteen (15) feet upstream from where the four-inch pipes were located. Again there was a strong sewage odor. According to Brown's notations, brush and the gravel bank in the area of the pipe appeared to have been disturbed, and trash, an old tire, and trees had been placed on top of the pipe. Div. 7 Full, p. 6. On the following day, January 20th, he detected the green dye

¹Because the testimony appeared to indicate that the two-inch pipe's location was the same as was shown for the four-inch pipes at their point of entry into the stream in the illustration on page two of Division's Exhibit 7, I sought a clarification from the parties as to when the illustration may have been drawn. That clarification is attached to this decision as Appendix A. My concern was whether the illustration may have been evidence that the Division had unwittingly discovered the two-inch pipe at a date much earlier than was consistent with their theory of the case, and that the four-inch pipes were misidentified in the illustration. I am now satisfied an alternate hypothesis exists which would provide a more reasonable explanation for the illustration's shortcomings; that is, that the placement of the four-inch pipes in the illustration, drawn so that they proceed from OGCB #5 easterly but stop well short of the stream, and that arrows show a northerly shift to where the pipes resume again and exit into the stream, may well have been an attempt to correct a geographical drafting error.

from the previous day's testing, pooling in an area within six-to-twelve inches of the two-inch pipe.

Under cross-examination, Mr. Brown stated that he did not see the two-inch pipe in November 1991, but that it may have been there. He added that on April 12, 1993, he had observed the two-inch pipe under water and admitted that the pipe may have been concealed under water when he went to the site in November 1991. He also testified that when the pipe was first discovered, it was barely visible even after removal of the debris. Brown also acknowledged that there was a possibility of other pipes being located in the area.

On February 24, 1993 Russell Brown again visited the site for the purpose of obtaining further water samples. His notes indicate that algae growth was visible near the two-inch pipe, that there was a septic odor present, and that the water was discolored near the four-inch pipes. Div. 12 Full.

Additional water samples were taken on April 12, 1993. Brown's notations indicate that the water was discolored at the four-inch pipes and at the two-inch pipe. There was a strong sewage odor in both locations. Div. 14 Full, p. 1.

On June 22, 1993 the Notice of Violation was issued. Div 1 Full. Thomas, Larossi's testimony and notes (Resp 3 Full) indicate that Russell Brown conducted a further dye test after the NOV was issued. On July 2, 1993, which was either the day of the testing or the day following the testing (the notes

indicate the testing was done on July 2; in testimony Iarossi stated that the testing had been done on the previous day), Thomas Iarossi visited the site and wrote that the dye had not discharged into the stream at either of the pipe locations. He did note that the green florescent dye was visible in a puddle in the gravel driveway in line with where the underground two-inch pipe would be located. No dye was visible in another puddle which was adjacent to the leaching field. Iarossi testified that he thought the water with the dye had bubbled up from the two-inch pipe, indicating that the pipe had a break in it.

According to Brown's notes, on August 2, 1993 Russell Brown met on site with Respondent's engineer Robert Boyer. (Div. 7 Full). Though Brown testified that he conducted a dye test in August 1993, there is no notation of such a test having been done. And although there is notation as well as testimony from Thomas Iarossi regarding Brown's July dye test, there was no testimony from Mr. Brown about the July test. It is quite possible that Brown confused the dates and that he was in error that testing was conducted in August. This possible confusion over the dates became important because if dye was found to have entered the stream through the two-inch pipe after a break was supposedly discovered in July, then, as Thomas Iarossi theorized, the pipe would have to have been dug up and repaired after the July puddle-with-dye incident.

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On May 25, 1994 the two-inch pipe was finally excavated. Approximately two hundred feet of pipe, from the stream to the leaching field was removed. It was discovered that the pipe extending from the leaching field had been previously cut, a section removed, and the end capped. Brown concluded that the section's removal must have been done between August 1993 and May 1994.

Thus the history of the two-inch pipe, according to the testimony of Russell Brown and Thomas Iarossi, was its installation sometime between July 1992 and January 1993; possibly an excavation after July 2, 1993 (if dye testing was conducted after that date and the dye was determined to have entered the stream) to repair the broken pipe; an excavation between August 1993 and May 1994 to remove the section of pipe and cap the end nearest the leaching field; and the final excavation of the two hundred feet of piping which was done at the Division's request in May 1994.

The Division presented David Chopy as the final witness in its case-in-chief. Mr. Chopy stated that Respondent was cited in the Notice of Violation for installation of the two-inch pipe not present during a previous investigation of the property because the Division considered there to be no other credible alternative explanation for the test results showing the two different locations of sewage discharge. According to Chopy, the Division considered this to be a "Type 1" violation

because of its impact on the environment, and a "Major" deviation from standard because of the willfulness of the person who performed the violation. The administrative penalty in the amount of twenty-five thousand (\$25,000.00) dollars was the maximum allowed by statute and was proposed by the Division of Water Resources and the Division of Groundwater and ISDS because Mr. Soscia had been previously notified of the environmental problem on the property, knew the pipe installation was an environmental violation and proceeded to install the pipe anyway.

Under cross examination, Mr. Chopy admitted that he had never been to the site and that his knowledge of the case was based on information from others and on their field notes. He also conceded that Mr. Soscia had been cooperative and even requested several of the tests. Later, however, there had been no dealings between the parties, so, as Mr. Chopy testified, there was no way to measure cooperativeness.

Respondent's first witness was Russell Tourgee. Mr. Tourgee testified that he does excavation work and has done grading of the parking area for Respondent. He had graded the lot, according to his testimony, so that the water flow would drain toward the stream. The grading usually occurred once a year, after winter had passed. He also testified that he had been on the site on May 25, 1994 for excavation of the two-inch pipe.

Both on direct and cross examination, Mr. Tourgee was asked about the appearance of the parking area which overlies much of the two-inch pipe. He stated that on May 25, 1994 the dirt was very compact and it was his opinion that for at least the prior nine (9) months, there had not been an excavation. He also testified that he had never seen construction work in the back area that he probably would have noticed if work had been done. He conceded under the Division's cross examination however, that heavy trucks would turn around to back up to the building to make deliveries to the market, and that those trucks could have packed down any loose hardpan dirt.

Wayne Cullen also testified for Respondent. Mr. Cullen has been an employee of Jerry's Market for eighteen years, and was manager of the store at the time of the hearing. Mr. Cullen testified that he was out in back of the building a couple times each day, but later claimed that he was not out there that often. He may have made this latter statement to explain the vagueness of some of his answers.

Mr. Cullen stated that the store had had a problem with water flow in the area in back of the building and puddles would form around the northerly catch basin and the loading dock area. During the winter of 1992-1993 in particular, according to Mr. Cullen, there had been problems with the water flow causing ice to accumulate and prevent access to the

back door to the boiler room. He also testified that he had noticed puddles, sometimes frozen, containing green dye in the parking area. His testimony was very vague as to when he had seen the dye in the puddles and he could not even specify a range of months, though some of the puddles had clearly formed in the winter months.

Bryan R. Soscia, Vice President of Soscia Enterprises, was Respondent's next witness. He stated that he was in charge of maintenance and repairs for the corporation. He testified that he did not install the pipe, did not know who had done so, had not known the pipe was even there until DEM discovered it, and did not repair the pipe. Yet he also testified that in the early 1980's he had been told by his parents that the pipe had been cut and capped.

As Soscia explained it, the building's downspouts were tied into the catch basins and the four-inch pipes which then drained into the unnamed stream. Surface water, which in the winter was 1-3 feet wide, would flow from the edge of the leach field towards the catch basin, and that water would also drain into the stream. When the pumps would be operating, the sewage would flow out of the leach field for approximately ten minutes and he would watch the flow.

He had observed sewage waste discharging from the four-inch pipes through OGCB #6 and, when OGCB #6 was clogged, the sewage waste would travel overground to OGCB #5. OGCB #6 would

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be clogged most of the winter and one winter it was blocked all winter long. He stated that he had tried to clear out the catch basin, but the problem would be in the pipe itself. When the water would freeze and block access to the boiler room door between OGCB #5 and OGCB #6, he could smell that it was sewage water. Unasked, Mr. Soscia also stated that the odor could even be detected in the store through 1990-1993 because he had received complaints from customers.

On those occasions when OGCB #5 or both of the catch basins became blocked, according to Soscia, the water would flow over and through the parking area towards the area where the two-inch pipe entered the stream. On cross examination he added that the clogging of the catch basins and the flow towards the stream happened "almost every day, every other day" at the end when the septic system was nearing complete failure.

Soscia also testified that, following the dye tests, he observed puddles containing dye beside the leach field, towards the building, in and near the catch basins, and at the end of the four-inch PVC pipe. During the winter dye test he had noted the dye in the area where the two-inch pipe enters the brook.

He also testified about the grading of the parking lot so the water would pitch toward the brook. He stated that the water flowed in the same patterns both before the issuance of

the NOV and in 1994 when Robert Boyer prepared the site plan (Resp. 1 Full).

Respondent's conclusions regarding the grading and contour of the site were challenged by Russell Brown in his rebuttal testimony. In the Division's rebuttal case, Russell Brown was qualified as an expert in land surveying with the acknowledged caveat that, since his was only an "eyeball" view and not done with instruments or even the intent of conducting a survey, the weight given his testimony would be limited. Initially Brown testified that the contours shown on the site plan were not consistent with the property's contouring prior to the issuance of the NOV. He also stated that a one to one-and-a-half foot berm did not allow runoff except in the area of the four-inch PVC pipes. Under Respondent's questioning, however, Brown conceded that he did not really dispute Boyer's representation of the contours and that the berm may have been broken through in the area of the two-inch pipe. With further questioning, he allowed that there was a swale and cut in the berm in the area of the two-inch pipe.

Bryan Soscia again testified, in surrebuttal, and was the final witness. He stated that there was no berm, and no berm near the two-inch pipe.

CONCLUSION

The central issue in deciding whether the Notice of Violation is to be upheld as to the purported installation of

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the two-inch pipe is whether Bryan Soscia's testimony is credible in light of the water samples and dye tests conducted by the Division. The Division dismissed Soscia's account that the four-inch pipes were tied into the downspouts and not the sewage system. When those pipes were excavated, according to the Division's scenario, Respondent installed the two-inch pipe to serve as a new drain for the failed sewage system. The water samples and dye test results support the Division's conclusion that on certain dates, sewage was entering the stream at one location and at a time following the excavation of the four-inch pipes, it was entering the stream at another, more upstream, location. The Division believed the two-inch pipe was installed for the specific purpose of channeling the sewage overflow into the stream at this new location.

Respondent presents a different scenario that also explains the test results. He has testified that sewage seeped from the bottom of the raised leach field, that the parking area and catch basins would sometimes stink of sewage, that he even heard complaints from store customers regarding the smell inside the market. Some of his testimony is supported by his store manager and some even by the Division's witnesses Brown and Iarossi.

On Bryan's Soscia's first day of testimony (April 11, 1995) I found him to be frank and credible, though he was much less candid and cooperative on the second day of his

testimony. He volunteered and admitted that the sewage problem had escalated to the point where he was receiving complaints from customers and that he had observed the sewage water flow across the parking lot and enter one of the catch basins, or if it was clogged, enter the brook directly.

Division's witness Russell Brown corroborated Soscia's account when he acknowledged under cross examination that he had seen seepage from the old leach field and that the whole back area had smelled. If Respondent had tied the four-inch pipes or to the two-inch pipe into the septic system in order to alleviate the overflow from the septic system, it certainly was not doing the job in directing the problem away from the store.

Further, the Division alleged in the NOV and in testimony that the two-inch pipe was installed between July 1992 and January 1993. Yet Brown's notations in Division's exhibits 7, 12 and 14 indicate that there was discolored discharge in the area of the four-inch pipes on January 13, 1993, February 24, 1993 and April 12, 1993, months after the two-inch pipe was allegedly hooked up to the septic system. Brown's notes of April 12, 1993 reference strong sewage odors both at the two-inch pipe and at the four-inch pipes. Discolored discharges and strong odors at both locations would seem to be more consistent with Respondent's explanation of events than with the Division's.

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There is also Brown's testimony that the two-inch pipe may have been in place at the time the Division conducted the first testing in the area of the four-inch pipes in November 1991. This is a concession which is contrary to what is alleged in the NOV and which undercuts the premise of the Division's case when taken in conjunction with the other evidence. If the two-inch pipe was present as early as November 1991, then the Division's testing which revealed the four-inch pipes as the point source of the pollution would buttress Respondent's position that the two-inch pipe was not connected to the septic system.

Accordingly, while the parties have stipulated to two offenses wherein a fecal coliform discharge occurred from Respondent's property into the stream and have agreed to the assessment of an administrative penalty in the amount of ten thousand (\$10,000.00) dollars, I find that the NOV cannot be upheld as to the further offenses alleged in the NOV.

Wherefore after considering the stipulations of the parties, and the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. Respondent Soscia Enterprises, Inc. is the owner of real property identified as Assessor's Plat 45, Lot #22 (the "subject property") located in the Town of Coventry.
2. Soscia Enterprises, Inc. is a corporation incorporated in the State of Rhode Island with its principal place of business in Coventry.
3. During 1991 through 1992, field inspections of the subject property were conducted by Division personnel including investigation concerning a four-inch diameter pipe running from the subject property to the stream.
4. During the course of the investigation referenced in paragraph 3, the Respondent was notified by letter from the Division that the placement of any pollutant, including sewage, in a location where it is likely to enter the waters of the State is prohibited. (Div 10 Full)
5. On January 13, 1993, a field inspection conducted by Division personnel revealed a pipe (the "two-inch pipe") in addition to the pipe referred to in paragraph 3 on the subject property.
6. No authorization was obtained from the Department by Respondent for the installation of the two-inch pipe or for any discharges from that pipe.
7. A Notice of Violation and Order was jointly issued to the Respondent by the Division of Water Resources on June 21, 1993 and by the Division of Groundwater and ISDS on June 22, 1993.
8. Respondent filed its request for hearing on July 9, 1993.
9. The hearing on this matter was conducted on April 10, 11 and 12, 1995.

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10. At the hearing the parties entered the following stipulation which addresses the allegations set forth in paragraph 1 of the NOV, that of unauthorized discharge into the waters of the State in violation of R.I.G.L. Section 46-12-5:

On February 24 and April 12, 1993, a fecal coliform discharge occurred from Respondent's property into the South Branch of the Pawtuxet River. The parties have agreed to the assessment of an administrative penalty in the amount of Ten Thousand (\$10,000.00) Dollars for the two offenses. The Division agreed not to seek a penalty for the discharge alleged to have occurred on January 19, 1993.

11. Evidence was presented at the hearing on the allegations set forth in paragraph 2 of the NOV, that of installing unauthorized pipe from the existing sewage system in violation of R.I.G.L. Section 46-12-5.
12. When the two-inch pipe was excavated on May 25, 1994, it was discovered that the pipe extending from the leach field had been previously cut, a section removed, and the end capped.
13. The leaching field, located immediately west of the gravel parking area, is at an elevation three to five higher than the parking area and slopes toward the stream bed.
14. Sewage seeped from the base of the leach field.
15. Sewage odor was noted in the whole area in back of the building both before and after the period when the two-inch pipe was alleged to have been installed.
16. The parking area had chronic and recurrent drainage problems.
17. Two catch basins, OGCB #5 and OGCB #6, alleviated some of the drainage problems.
18. The catch basins were connected to each other by a four-inch pipe and two four-inch pipes ran from OGCB #5 to the stream.

19. There were times, particularly in winter, when one or both catch basins would become clogged.
20. There were times, particularly in winter, when one or both four-inch pipes would become clogged.
21. On occasion, the water would flow over the ground and into the stream.
22. The Division collected water samples at different locations both before and after January 1, 1993.
23. Prior to January 1993, the water sample collected at the stream with the highest reading of fecal coliform was in the area of the four-inch pipes.
24. After January 1, 1993, the water sample collected at the stream with the highest reading of fecal coliform was in the area of the two-inch pipe.
25. Several dye tests were conducted by the Division.
26. On July 2, 1993, Thomas Iarossi noted dye in a puddle on the surface of the ground.
27. In the NOV and in testimony, the Division maintained that the two-inch pipe was installed between July 1992 and January 1993 but there was also testimony from a Division witness that the two-inch pipe may have been present in November, 1991.
28. After January 1993, the Division continued to note colored discharge and strong sewage odor in the area of the four-inch pipes.
29. The sewage disposal system has been repaired.

Based upon the foregoing facts, I make the following

CONCLUSIONS OF LAW

1. Respondent made a timely request for hearing in accordance with R.I.G.L. §42-17.1-2 (u) (1).
2. Pursuant to the provisions of R.I.G.L. §42-17.6-4, the Department of Environmental Management ("DEM") has the burden of proving each and every act or omission alleged by a preponderance of the evidence.

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3. The DEM has not met its burden to prove the installation of unauthorized pipe from the existing sewage system in violation of R.I.G.L. §46-12-5.

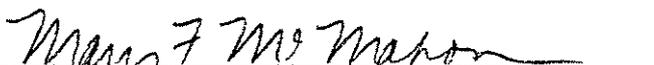
Wherefore, it is hereby

ORDERED

Respondent shall, within thirty (30) days after the Final Agency Order is signed by the Director, pay an administrative penalty in the amount of Ten Thousand (\$10,000.00) Dollars by certified check, made payable to the "General Treasurer, State of Rhode Island" and send it to:

Rhode Island Department of Environmental Management
Attention: Glenn Miller
Office of Business Affairs
22 Hayes Street
Providence, Rhode Island 02908

Entered as an Administrative Order this 8th day of February, 1996 and herewith recommended to the Director for issuance as a Final Agency Order.



Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

MAR 24 Entered as a Final Agency Order this 21st day of February, 1996.



Timothy R. E. Keeney
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

SOSCIA ENTERPRISES, INC.
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CERTIFICATION

I hereby certify that I caused a true copy of the within Final Agency Order to be forwarded, via regular mail, postage prepaid to Mark A. Pogue, EDWARDS & ANGELL, 2700 Hospital Trust Tower, Providence, Rhode Island 02903 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this ~~21st~~ day of ~~February~~, 1996.

MARCH

Doris R Stewart

APPENDIX A

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: SOSCIA ENTERPRISES, INC.
NOTICE OF VIOLATION NO. 1130

AAD No. 93-012/WRE

STIPULATION

The parties hereby stipulate and agree that the diagram appearing at page 2 of the Division's Exhibit 7 was drawn on or about November 14, 1991.

Further, the parties stipulate and agree that the Affidavit of Russell Brown, filed on or about July 20, 1995, may be withdrawn, and shall be given no consideration in this proceeding.

7-26-95

Date

Mark A. Pogue

Mark A. Pogue
EDWARDS & ANGELL
2700 Hospital Trust Tower
Providence, Rhode Island 02903
(401) 274-9200
Telecopy (401) 276-6611
Counsel for Respondent

7-26-95

Date

Gary Powers

Gary Powers
Department of Environmental
Management
Office of Legal Services
9 Hayes Street
Providence, Rhode Island 02908
Counsel for the Division

APPENDIX B

STIPULATIONS OF THE PARTIES

Pursuant to the prehearing conference conducted on August 12, 1994, the parties agreed to the following stipulations of fact (as they are set forth in the Prehearing Conference Record and Order entered on August 18, 1994):

1. The Respondent Soscia Enterprises, Inc. owns the realty identified as Assessor's Plat 45, Lot #22 ("the subject property") located in the Town of Coventry.
2. Soscia Enterprises, Inc. is a corporation which was incorporated in the State of Rhode Island and has its principal place of business in Coventry.
3. During 1991 through 1992, field inspections of the subject property were conducted by Division personnel including investigation concerning a four-inch diameter pipe running from the subject property.
4. During the course of the investigation referenced in Paragraph #3, the Respondent was notified by letter by the Division that the placement of any pollutant, including sewage, in a location where it is likely to enter the waters of the State is prohibited (a copy of which is attached as Division's Exhibit #10).
5. On January 13, 1993, a field inspection conducted by Division personnel revealed to the Division a pipe in addition to the pipe referred to in paragraph 3 on the subject property.
6. No authorization was obtained by Respondent from the Department for the installation of the pipe referred to in paragraph 5 or for any discharges from that pipe.
- 6a. At least a portion of the pipe referred to ~~referred to~~ in paragraph 5 was removed by the Division and now cannot be located.
7. On three occasions following its discovery on January 13, 1993, i.e., January 19, February 24, and April 12, 1993, field inspections were conducted by Division personnel.
8. LCP National Plastics is not the only manufacturer of PVC pipe.

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APPENDIX C

LIST OF EXHIBITS

The below-listed documents and property are marked as they were admitted at the hearing.

Division's Exhibits:

- Div. 1. Full A copy of the Notice of Violation Order and Penalty issued to the Respondent Soscia Enterprises, Inc. by the Division on June 18, 1993 with attachments, (11 pp.).
- Div. 2 Full A copy of the Respondent's request for hearing dated July 8, 1993 (1 p.).
- Div. 3 Full Curriculum vitae of David Chopy, P.E. (1 p.).
- Div. 4 Full Curriculum vitae of Russell Brown (1 p.).
- Div. 5 Full Curriculum vitae of Thomas Iarossi (1 p.).
- Div. 6 Full Curriculum vitae of Dale Alley (2 pp.).
- Div. 7 Full A copy of the complaint/inspection reports prepared by R. Brown for the period November 6, 1991 through May 27, 1994 including field memoranda, three photographs and maps of the site (8 pp.).
- Div. 8 Full A copy of field inspection report prepared by T. Iarossi dated July 30, 1992 and three photographs taken at that time (2 pp.).
- Div. 9 Full A copy of Submission/Analysis Forms of the R.I. Department of Health Division of Laboratories dated November 14, 1991 (8 pp.).
- Div. 10 Full A copy of a certified letter sent to Soscia Enterprises, Inc. by D. Chopy dated February 6, 1992 including executed postal receipt on rear of exhibit (1 p.).
- Div. 11 Full A copy of the Sample Submission/Analysis Forms of the R.I. Department of Health Division of Laboratories dated January 13, 1993 (2 pp.).

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- Div. 12 Full A copy of inspection report by R. Brown dated February 24, 1993 (1 p.).
- Div. 13 Full A copy of Sample Submission/Analysis Forms of the R.I. Department of Health Division of Laboratories dated February 24, 1993 with chain of custody record (6 pp.).
- Div. 14 Full A copy of inspection report of R. Brown dated April 12, 1993 with two copies of Sample Submission/Analysis Forms of the R.I. Department of Health Division of Laboratories dated April 12, 1993 (3 pp.).
- Div. 15 for Id A copy of inspection report by R. Brown dated May 25, 1994 along with map and three photographs (2 pp.).
- Div. 16 for Id A copy of inspection report by T. Iarossi dated July 2, 1994 along with copies of two photographs (1 p.).
- Div. 16A Full Photograph of puddle at N.E. corner of building, dated 7/3/93.
- Div. 16B Full Photograph of puddle at N.W. corner of Jerry's Market, dated 7/3/93.
- Div. 17 Full Unsigned document entitled "Affidavit of Wayne Cullen".
- Div. 18 Full Copy of letter to David E. Chopy from Robert E. Boyer, dated August 10, 1993.

Respondent's Exhibits:

- Resp. 1 Full Site Plan dated June 30, 1994.
- Resp. 2 Full Section of 1 and 1/2 inch pipe, approximately five feet long.
- Resp. 3 Full DEM Inspection Report, 7/2/93.
- Resp. 4 Full "Affidavit of Michael Isenburg.
- Resp. 5 Full Photograph of the back of the building, taken between June 1993 and April 1994.

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- Resp. 6 Full Photograph of catch basin #5, taken in April 1995.
- Resp. 7 Full Photograph of catch basin #5, taken approximately April 1994.
- Resp. 8 For Id Photograph of 4" PVC pipes, taken approximately April 1994.
- Resp. 9 Full Photograph of catch basin #5, taken in April 1995.
- Resp. 10 Full Photograph of coffee cups indicating location where pipes enter the brook, taken in April 1995.
- Resp. 11 Full Photograph of loading dock next to catch basin #5, taken in April 1995.
- Resp. 12 Full Photograph of rut.
- Resp. 13 Full Photograph of incline leading to catch basin #6.
- Resp. 14 Full Photograph of incline and catch basin #6.
- Resp. 15 For Id Copy of notes from Bryan Soscia dated June 23, 1994 (5 pp.).
- Resp. 16 For Id Copy of Affidavit of Reese Sumrall, dated April 7, 1995.